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Supreme Court of the United States

October Term, 1903

HANNAH O'CALLIGAN AND EDWARD CORCORAN, *Appellants.*

vs.

TERENCE O'BRIEN, AS ADMINISTRATOR OF THE ESTATE OF JOHN SULLIVAN, DECEASED; MARIE CARRAU, W. M. RUSSELL, AND S. F. COOMBS, *Respondents.*

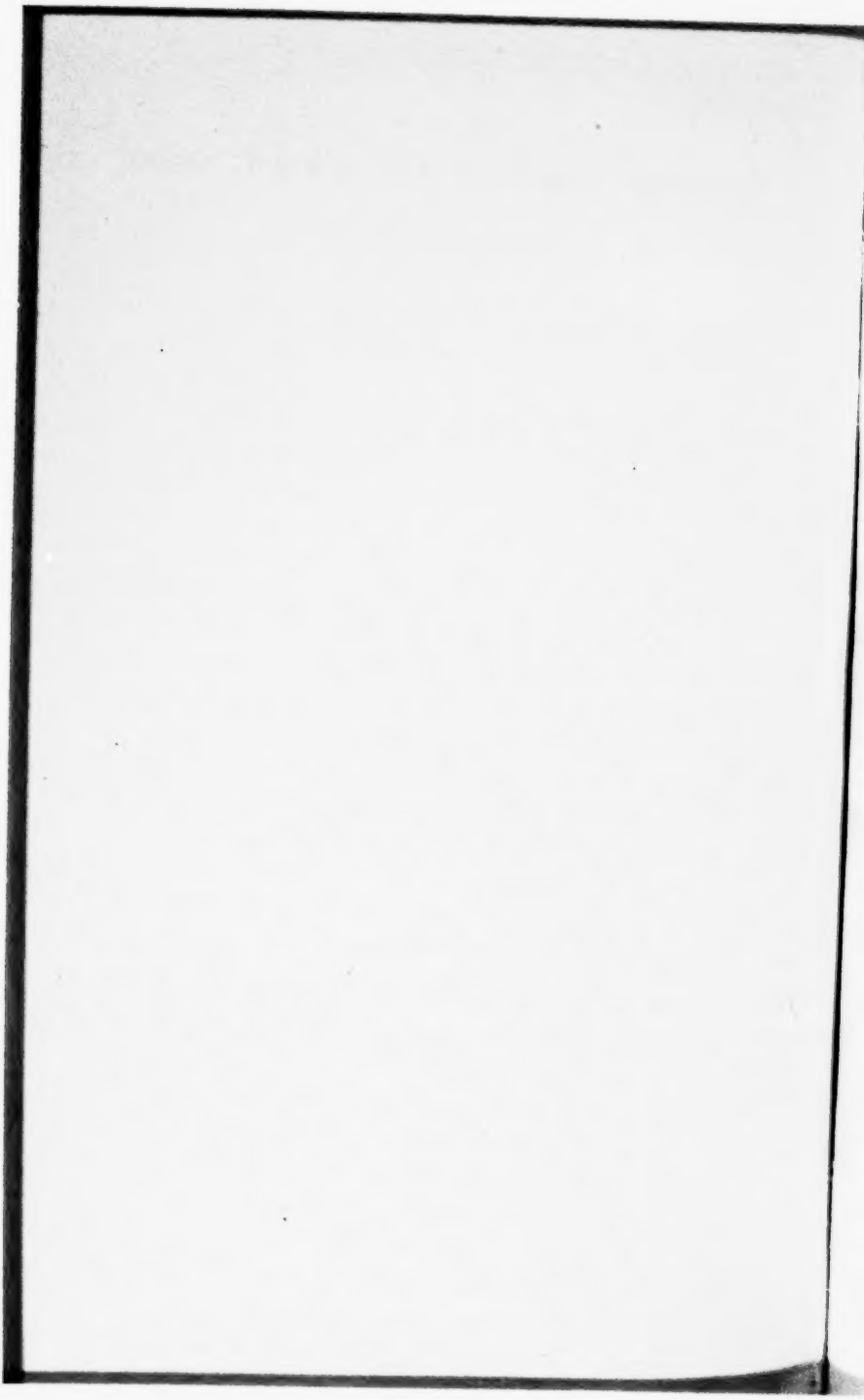
No. 193.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

Brief of J. W. Robinson and J. P. Houser, solicitors, for respondent, Marie Carrau, in support of the motion to dismiss the appeal, and upon the merits.

J. W. ROBINSON,
OLYMPIA, WASH.
J. P. HOUSER,
MT. VERNON, WASH.
Counsel for Respondents.

RECORDER PUBLISHING COMPANY, OLYMPIA.



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STATEMENT.

A. On September 26, 1900, John Sullivan, a bachelor, died in Seattle, Washington, seized of real and personal property of the value of more than $500,000. He was engaged to the respondent, Marie Carrau, and was to have been married to her on October 1st, 1900. The night of his death and a few hours prior thereto, he called certain persons residing in the house where he died, to his bedside and requested them to witness that he devised all his property both real and personal, worth many thousands of dollars, to Marie Carrau. Those in attend-

ance upon him at that time did not consider that he was seriously ill, but early next morning he died and the following morning, Marie Carrau requested her spiritual advisor, Father Sweere, a Catholic priest, to learn for her whether or not an oral will was of any value, which he did and in a few days informed her that an oral will in the state of Washington, was not valid. The deceased left no immediate relatives, if he left any. Shortly after his death a special administrator was appointed upon the petition of creditors in the probate department of the superior court of King county, Washington, which was the county in which the deceased had resided for many years and wherein was situate his proporty. Thereafter on November 19, 1900, the respondent, O'Brien, was appointed administrator, his bond fixed at $80,000, and immediately thereafter he qualified and has been in possession of the assets of said estate ever since and said estate has been ever since and is now being administered in the probate department of said state court. Believing that the oral will was void as told her by Father Sweere, Marie Carrau joined in asking for the appointment of an administrator, but in about four months there after, she learned through the wife of a practicing attorney to whom she was teaching French, that an oral will *was valid* in the state of Washington, and within a few days after securing this information, to-wit, on March 8, 1901, she caused this nuncupative will to be probated in the probate department of the superior court of King county, Washington, and such decree is in words and figures as follows:

"In the Superior Court of the State of Washington, for King County. In Probate.
"In the Matter of the Estate of John Sullivan, Deceased.

No. —

DECREE ADMITTING WILL TO PROBATE.

Marie Carrau having on the 8th day of March, 1901, in person and by her attorneys, Messrs. Hays, Houser, and Pratt & Riddle, submitted to and filed in this court a certain document in writing of a testamentary nature, being the words and the substance thereof spoken by the deceased, John Sullivan, purporting to be the last will and testament of the said John Sullivan, deceased, to-wit, a nuncupative will, and also her petition praying among other things for the admission to probate of the said document as and for the last will and testament of the said deceased.

And this court having duly ordered a citation to issue to the widow or next of kin of the deceased, and said citation having been issued, and by the sheriff of King county, Washington, duly made return thereof, by which return it appears that there is no widow or next of kin of the said deceased, John Sullivan.

Now on this the 8th day of March, 1901, the hearing of the said petition comes on regularly before the court in open session;

And it fully appearing to the satisfaction of the court that the said petition sets forth all the facts necessary to give this court jurisdiction over the estate of the said deceased and jurisdiction to admit to probate the last will and testament of the said deceased, and witnesses having been examined under oath and their testimony taken and reduced to writing in open court, to-wit, the testimony of Louis Daussat, Augustine Daus-Hermance Carrau, and Marie Carrau, the petitioner, all said witnesses being over the age of 21 years at the time of the speaking of the words constituting said nuncupative will set forth in the petition herein, and the same having been filed and the evidence being closed, and the matter having been duly and regularly and finally submitted to the court for consideration and decision, and all and singular the law and the premises being now by the court here fully understood and duly considered, the court finds the facts applicable to this matter to be as follows: That the said John Sullivan died

testate on the 26th day of September, 1900, at No. 1413 Seventh avenue, Seattle, Washington;

That at the time of his death the said deceased was a resident and had been for a period of more than 10 days in said house as his dwelling house imediately preceding the date of his said death and left estate in said King county subject to administration in the state of Washington;

That the said document purporting to be the last will and testament of said John Sullivan, deceased, was duly executed by him in his life time, to-wit, on the 25th day of September, 1900, at about the hour of 11 o'clock p. m. of said day, and during his last illness, and from which his death ensued, in the presence and hearing of the said Louis Daussat, Augustine Daussat, Hermance Carrau, and Marie Carrau, the petitioner, all said competent persons to witness the making of said will and the words by the deceased then and there spoken, and which words were afterwards reduced to writing by the said witnesses, and by them duly subscribed, and also that the said deceased then and there, in the presence of the said witnesses published the said document and will as, and declared the same to the said witnesses to be his last will and testament, which was by said witnesses duly attested and signed by each of them on the following day after the speaking of said words, and the pronouncing of the same, or to that effect; and that the said deceased did bid said witnesses then present to bear witness that such was his last will;

That said will was made at the time of the last sickness, and where he had been residing for the space of more than 10 days previous to the pronouncing thereof;

That the said deceased at the time of executing the said last will and testament was over the age of majority, to-wit, of the age of about 60 years, and was of sound and disposing mind and memory, and not acting under duress, menace, fraud, nor any undue influence whatsoever, nor in any respect was he incompetent by last will to devise and bequeath his estate;

That Marie Carrau is named in the said will as the sole legatee thereof, and of the entire estate of the deceased, John Sullivan, by the terms of said will;

Now, therefore, by reason of the law and facts aforesaid, it is considered, ordered, adjudged and decreed by the court here, that the jurisriction to admit to probate the last will and testament of the said deceased, appertains unto our said superior court; that the said document submitted for probate on the 8th day of March, 1901, is the last will and testament

of the said John Sullivan, deceased, and that the same was properly and legally executed, and is entitled to be, and is, hereby admitted to probate;

That a certificate of probate thereof be granted, and that the said last will and testament, together with said certificate be duly entered of record in the records of wills in this court, as provided by law.

Done in open court this 8th day of March, 1901.

BOYD J. TALLMAN,
Judge of said Superior Court of King County, State of Washington.

Filed March 8, 1901.

C. A. KOEPELI,
Clerk.

B. On June 20, 1901, these appellants, as British subjects, filed a bill in equity against Marie Carrau, as legatee under said will and Terence O'Brien, as administrator of said estate, in the United States circuit court of the district of Washington. The purpose of the bill was to contest the will so probated and revoke the probate thereof, and in addition to the allegation of adverse citizenship, the bill alleged that the will was secured and probated by fraud, and that the probate court had not issued proper citation, and hence had no jurisdiction to probate the will. The administrator appeared and disclaimed any interest in the estate other than as an administrator appointed by the state court. Marie Carrau appeared by her solicitors and at every stage of the proceedings objected to the jurisdiction of the federal court principally upon two grounds:

First. Because the circuit court had no jurisdiction of the 'subject matter," and,

Second. Because it appeared upon the face of the pleadings that if all the "necessary" parties were before the court, such court would be ousted of its jurisdiction, it appearing upon the face of the pleadings that Eugene T. Sullivan, claim-

ing to be an heir of the deceased, was a citizen and resident of the state of Washington, and claiming in opposition to Marie Carrau, as the legatee.

The circuit court held that it had jurisdiction, and after trial, entered a decree against Marie Carrau, cancelling the will and revoking the decree in the state court, probating the same.

From this decree, Marie Carrau appealed to the United State circuit court of appeals for the Ninth circuit, and the court reversed the circuit court, for the reason that the circuit court was without jurisdiction of the subject matter of the suit, and further, because of the fact that all the necessary parties were not before the court, who if made parties would have ousted the court of jurisdiction, and directed the circuit court to dismiss the bill.

See *Carrau v. O'Callaghan, et al.*, 125 Fed., 657.

(See Transcript, pages 543, 544 and 545.)

C. On June 20, 1901, the same date on which these appellants, as British subjects (and as they claimed a few minutes after filing the bill in equity in the federal court), filed a petition in contest in the probate department of the superior court of the state of Washington for King county, In re estate of John Sullivan, deceased, in and by which they sought to contest said will and to cancel and set aside the decree probating the same on March 8, 1901, in which petition in contest they gave notice of the filing of said bill in equity in the federal court.

D. In April, 1902, more than one year after the date when the nuncupative will had been probated, on motion of the attorneys for Marie Carrau, who had appeared specially in that proceeding, the state court entered an order striking appellants' petition in contest from the files, and on April 18, 1902, these

appellants filed therein another petition in contest, but as to this second petition in contest no citation was issued, and thereafter the attorneys for Marie Carrau filed a motion in the state court to dismiss the second petition in contest for want of jurisdiction in the court to entertain it after the expiration of one year from the date of the decree probating the will.

E. In March, 1904, the attorneys for Marie Carrau moved to dismiss the second petition in contest in the state court for want of prosecution and also noticed for hearing, that motion and the former motion to dismiss for want of jurisdiction and on January 6th, 1905, the state court dismissed the appellants' petition in contest of this will, for failure to prosecute and also because the petition having been filed after the expiration of the one year in which, under the statute a contest might be maintained, the court had no jurisdiction, and entered a decree dismissing the petition in contest and gave judgment against these appellants for costs, and the correctness of that judgment of dismissal is now pending in the supreme court of the state of Washington, on appeal.

F. The petition in contest in the state court by Eugene Timothy Sullivan, also a citizen of the state of Washington, against Terence O'Brien, as administrator, and Marie Carrau, the legatee under the will, is still pending undetermined in the state court, in which Sullivan claims in such proceeding, that he and his sister are the only heirs of John Sullivan, deceased, being his first and only cousins, and the contests of all other claimants are still pending in the state court undetermined.

G. And the decision of the United States circuit court of appeals, for the Ninth circuit, reversing the circuit court, and directing the dismissal of the bill in equity for want of jurisdiction, is before this Honorable Court on appeal and there is also pending before this Honorable Court the petition of these

appellants for a writ of certiorari and reference is hereby made to the printed brief of these solicitors for Marie Carrau, in opposition to that petition.

II. There is also pending here, a motion to dismiss this appeal because the decision of the circuit court of appeals was final under section 6 of the act of congress, creating the circuit court of appeals, approved March 3, 1891.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1903.

HANNAH O'CALLIGAN AND EDWARD CORCORAN, *Appellants.*

vs.

TERENCE O'BRIEN, AS ADMINISTRATOR OF THE ESTATE OF JOHN SULLIVAN, DECEASED; MARIE CARRAU, W. M. RUSSELL, AND S. F. COOMBS,

Respondents.

MOTION TO DISMISS APPEAL.

Comes now, Marie Carrau, by her solicitors, J. W. Robinson, and J. P. Houser, and moves this Honorable Court to dismiss this appeal because the decree of the circuit court of appeals of the Ninth district, from which this appeal is prosecuted, was final under the provisions of section 6 of an act of congress creating the circuit court of appeals, approved March 3, 1891, with the amendments thereto.

J. W. ROBINSON and
J. P. HOUSER,
Solicitors for Marie Carrau, Respondent.

ON MOTION TO DISMISS.

First. On the motion to dismiss, there is but one question. We *insist that the bill in equity* (See Transcript, pages 4 to 11, inclusive) *invoked the jurisdiction of the circuit court, solely upon the ground of diversity of citizenship*, and hence the decree of the circuit court of appeals was final.

These appellants filed this bill in equity on June 20, 1901, in the circuit court of the United States, for the district of Washington, against the respondents, Terence O'Brien, as

administrator, and Marie Carran, the legatee under the will probated by the state court. The complainants were Hannah O'Callaghan and Edward Corcoran, claiming to be subjects of the Kingdom of Great Britain, and the only first cousins of deceased. The sole purpose of the bill in equity was to contest the nuncupative will probated in the state court and the principal relief sought was to have the decree probating the will cancelled for the alleged reason, that the state court had no jurisdiction to probate the will, because it had not issued process to secure jurisdiction of the parties. In other words, the purpose of the bill was to contest the will and to review and set aside the decree of the state court, probating the will, for want of jurisdiction, and jurisdiction was invoked because of the diversity of citizenship and upon no other ground. The prayer of the bill is for a decree adjudging the pretended nuncupative will null and void, and among other things, that the complainants (appellants here) be decreed to be the only heirs at law of the deceased Sullivan, and entitled to receive the whole of his estate and that the defendant, Terence O'Brien, as administrator of the estate, be enjoined from turning over any of the property to the respondent, Marie Carran, or to any other person or persons than the complainants.

The answer of Marie Carran in the circuit court, denied the relationship of these appellants to the deceased Sullivan. Her answer also put in issue, all the allegations of the bill, in respect to fraud and conspiracy, and among other things, she sets up in her answer, that she was engaged to the deceased and was to have been married to him on Oct. 1, 1900. That Sullivan did make and publish the nuncupative will probated on March 8, 1901, by the probate court of King county, Washington, by which he devised to her, all of his property. That immediately after the death of Sullivan, she informed

Father Sweere, a Catholic priest and her spiritual advisor, that Sullivan did make and publish the oral will and that she never atempted to conceal that fact but on the contrary, she caused a regular practicing attorney in Seattle, to be consulted as to the validity of an oral will, by whom she was informed that such will was not valid in the state of Washington, and that it was many weeks thereafter before she learned that such a will was good and she then promptly had the will probated.

She denies that the superior court of King county probating the will, acted without jurisdiction, but on the contrary, alleges that said court had the exclusive jurisdiction. Her answer also sets up the facts of the lack of jurisdiction in the circuit court, over the subject matter of the suit and then sets forth the statute, which is as follows:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator at the time of pronouncing the same did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return."

Ballinger's Code of Washington, volume 1, section 4605.)

Her answer also sets forth the claims to heirship and to said estate, of the various persons claiming to be the sole heirs and entitled to inherit the whole of the estate of the deceased, among which claimants, was Eugene Timothy Sullivan, on his own behalf and that of his sister, who were each citizens and actual residents of the state of Washington.

The answer also set up that these appellants filed a verified

petition in contest and appeared by Piles, Donworth & Howe, and C. H. Farrell, their attorneys, who were also complainants' solicitors and are the attorneys here for appellants, by which they sought to contest the nuncupative will and that they filed such petition in contest in the superior court of King county, Washington, "In re Estate of John Sullivan, deceased," in which Hannah Callaghan (mentioned herein as O'Callaghan) and Edward Corcoran were petitioners and Terence O'Brien, as administrator, and Marie Carrau, as legatee, were respondents. And that they caused citation therein, under seal of the superior court of King county, Washington, to be issued and which was served upon the respondents.

The answer also alleged that a large number of these claimants had filed petitions in the probate court and caused citations to be issued and served and that all such contests are still pending in the state court, undetermined, and that Marie Carrau was contesting these petitions and defending her rights under said will against all of these claimants who were seeking the same kind of relief as these appellants.

The complainants (appellants here) filed a replication to the answer of Marie Carrau, but no issue was taken as to the allegations with reference to the various claimants and the filing of their contests in the state court, nor did said reply deny that Eugene Timothy Sullivan, a claimant, contesting said nuncupative will, was then and had been for many years, a citizen and resident of the state of Washington.

So it was conceded that upon the face of the pleadings, it appeared that Eugene Timothy Sullivan, was a claimant contesting said nuncupative will, against Marie Carrau, and that he and his sister claimed to be the sole heirs of the deceased Sullivan, and that they were citizens of the state of Washington, and claiming adverse to Marie Carrau.

And these conceded facts ousted that court of its jurisdiction, and coming to the attention of the circuit court, the bill should have been dismissed accordingly.

Second. Certainly there is nothing in the bill which by any process of reasoning calls for a construction of any act of congress. The constitution and laws of the state of Washington, involved in this action are not claimed to be in contravention to the constitution of the United States. All that is claimed and all that can be claimed for this bill, is that the state court failed to issue process to secure jurisdiction of the persons claiming to be interested in the estate, and therefore acted wholly without jurisdiction, but the facts of the bill show that the state court had jurisdiction to enter a decree probating the will. That the probate court had been administering this estate for many months prior to the filing of this bill, and these appellants allege that by reason of the administration of said estate, they feared the assets thereof would be distributed to Marie Carran as a legatee under this will, and they would thus be deprived of the property "*without due process of law*," and by this contention, they seek to avoid section 6 of the act creating circuit courts of appeals, making its judgments final when jurisdiction depends entirely upon diversity of citizenship. But "due process of law" has no such meaning as they attempt to give it. The allegations in the bill, to the effect that the probate court proceeded without jurisdiction, is a mere conclusion but the answer specifically denies these allegations and sets up the facts showing that the superior court had jurisdiction and found in its decree, all the facts affirmatively necessary to give the probate court jurisdiction to probate the will.

Appellants have continuously claimed that the proceeding to probate the will, was a proceeding inter-partes, but we in-

sist that this is not debatable grounds. The probate court already had and had had for many months, jurisdiction of the subject matter, as well as all persons having any interest in the estate, and the application to have the will probated, was a special proceeding in the nature of a proceeding *in rem*.

We now desire to call the Court's attention to the pleadings in the circuit court, to-wit:

A. The Bill in Equity. (Transcript, pages 4 to 11 inclusive.)

B. Objection to Jurisdiction by Marie Carrau, (Transcript, pages 16 and 17).

C. Marie Carrau's Plea in Abatement, (Transcript, pages 19, 20 and 21).

D. Answer of Marie Carrau, (Transcript, pages 36 to 43, inclusive).

E. Opinion and Decree of Circuit Judge Hanford, (Transcript, pages 121 to 133, inclusive).

F. Opinion of Circuit Court of Appeals, (Transcript, pages 826 to 845, inclusive).

Among the cases in which the judgments or decrees of the circuit court of appeals are made final, are those in which the jurisdiction of the circuit court,

"Is dependant entirely upon the opposite parties to the suit, or controversy, being aliens and citizens of the United States or citizens of different states." Section 6, 26 Stat., page 828.

And,

"In all cases not hereinbefore in this section made final, there shall be of right, an appeal or writ of error or review of the case by the Supreme Court of the United States, when the matter in controversy shall exceed $1,000."

So it will be seen that upon this motion to dismiss, appellants must make it appear to this Honorable Court, that the jurisdiction was not dependant entirely upon the opposite parties, being citizens of different states, and it must appear from the record, that this case is one of which the circuit court could

take cognizance independently of the citizenship of the real parties in interest.

Wherein was jurisdiction invoked upon federal grounds? Eliminate diversity of citizenship and you have nothing left. Nothing can be ponted out in this bill, which will rightfully invoke the jurisdiction of the federal courts, and this appeal should be dismissed.

Rouse vs. Letcher, 156 U. S., 47.

Huguely M. Co. vs. Galeton Cotton Mills, 184 U. S., 290.

In the last above cited case, on page 295, this Honorable Court used the following language:

"If, after the jurisdicton of the circuit court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section 5, then the case may be brought directly to this court, although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right.

Lobe vs. Columbia Trustee, 179 U. S., 472.

"If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the constitution, laws or treaties of the United States, then the jurisdicton of this court is exclusive, but if it is placed on diverse citizenship and also on grounds independent of that, then if carried to the court of appeals, the decision of that court would not be made final, and appeal or writ of error would lie."

American Sugar Co. vs. New Orleans, 181 U. S., 277.

Howard vs. U. S., 184 U. S., 676.

Northern Pacific vs. Soterberg, 188 U. S., 526.

Robinson vs. Caldwell, 165 U. S., 359.

Florida Central R. R. Co. vs. Bell, 176 U. S., 321.

The appeal from Circuit Judge Hanford's decision, was upon the merits, and as we understand the law, we had the right to appeal direct to the Supreme Court of the United States on the question of jursdiction alone, but we also had the

right to appeal to the circuit court of appeals on the merits, and there have reviewed all questions arising in the circuit court. The circuit court of appeals passed upon the question of jurisdiction and having reached the conclusion that the circuit court had no jurisdiction of the subject matter, and also that if the circuit court had jurisdiction of the subject matter, all the necessary parties were not before the court, who if made parties would oust the court of jurisdicton, upon the grounds of citizenship, and for both reasons, reversed the lower court and directed the dismissal of the bill.

The contention that the circuit court of appeals had no jurisdiction to review the decision of Circuit Judge Hanford, is raised for the first time in the Supreme Court of the United States. The jurisdiction of the circuit court of appeals was not questioned, neither in the briefs nor arguments before that court, nor was it suggested or raised in the petition for rehearing.

The circut court of appeals having held that the circuit court had no jurisdiction, it rightfully refused to pass upon the merits.

It is probably not strange that we are unable to fully understand the position of the solicitors for the appellants with reference to the claim made, that the circut court of appeals had no jurisdiction to review the decision of the circuit court. The circuit court held that it had jurisdiction of the subject matter and that the other claimants to the estate were not necessary parties, and entered a decree against us upon the merits, and it was necessary for us to appeal to that court in which we could not only have the question of jurisdiction reviewed, but the decree upon the merits. The circuit court passed upon the question of jurisdiction of the state court to probate the will, holding that the state court had no such jurisdiction and cancelled and revoked the decree probating the will, and held that the words constituting the nuncupative will

were never spoken, and yet these facts were testified to by four witnesses, and there was not a syllable of evidence to dispute these facts or which tended to contradict these witnesses, nor was there any attempt whatever made to discredit the evidence of or impeach the witnesses, and based upon this finding the circuit court enjoined Marie Carrau and her representatives from ever claiming any rights by reason of said nuncupative will or the decree probating the same, and hence the necessity for having the case revewed on its merits. We certainly had the right to have this case reviewed upon its merits as well as upon the question of jurisdiction.

How it can be successfully contended in one breath, that the Supreme Court has jurisdiction to review the decision of the circuit court of appeals, and in the next breath, that the circuit court of appeals had no jurisdiction, is beyond our comprehension. Had the circuit court of appeals sustained the jurisdiction of the circuit court, that court would then have passed upon the merits, and the contention made by the solicitors for the appellants, seems to us to mean that we would be compelled to take two appeals, one to the circuit court of appeals on the merits and one to the Supreme Court on the question of jurisdiction, and this is clearly contrary to the act relating to appeals and as shown by the authorites cited by appellants in their brief, on the motion to dismiss this appeal.

We submit with confidence, that the decree of the United States circuit court of appeals, in reversing Circuit Judge Hanford, was final and cannot be reviewed in this court and we cite the following decisions, which sustains our contentions in this particular, and that the appeal should be dismissed.

Sec. 6, Act March 3, 1901, Vol. 1, Supplement Revised Statutes, page 903.

Rule 8 of the Supreme Court.

Carrau vs. O'Callaghan, 125 Fed., 657.

United States vs. Taylor, 147 U. S., 695.

Loeb vs. Columbia Township Trustees, 179 U. S., 483.
Ayres vs. Polsdorfer, 187 U. S., 589.

J. W. Robinson and
J. P. Houser,
Solicitors for Marie Carrau.

BRIEF ON THE MERITS.

No Jurisdiction of Subject Matter.

1. The United States circuit court of appeals in rendering its decision, reviewing the decision of the circuit court of the district of Washington, after stating the facts of the pleadings, said:

"We are of the opinion, that the court below was without jurisdiction of the subject matter of the suit and further that all necessary parties were not before the court, some of whom if made parties would have ousted the court of jurisdiction. On both of these grounds we think the court below should have dismissed the bill at the complainants' cost."

2. The conclusions reached by the circuit court of appeals, to the effect that the circuit court was without jurisdiction of the subject matter of the suit was based upon the constitution and statutes of Washington. (See Opinion of Circuit Court of Appeals, beginning on page 834 of the Transcript.)

Section 6 of article IV of Washington's state constitution, clothed the superior courts of the state with original jurisdiction,

"Of all matters of probate," as well as of all cases in equity and of all cases at law not specially excepted.

The state statutes provide that,

"The superior courts in the exercise of their jurisdiction in matters of probate, shall have power;

1—To take proof of wills and to grant letters testamentary and of administration * * *,

2—To settle the estates of deceased persons and the accounts of executors, administrators and guardians,

3—To allow or reject claims against the estate of deceased persons as hereinafter provided, * * *.

5—To award process and cause to come before them all persons whom they may deem it necessary to summon, whether parties or witnesses or who, as executors, administrators, or guardians or otherwise, shall be intrusted with or in any way accountable for any property belonging to any minor, orphan, or person of unsound mind or estate of any deceased person.

6—To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction." Hill's Annotated Statutes and Codes of Washington, Vol. 2, Sec. 845.

By section 851 of the same statute, it is provided that:

"Wills shall be proved and letters testamentary or of administration shall be granted;

1—In the county of which deceased was a resident or had his place of abode at the time of his death;

2—In the county in which he may have died, leaving estate therein and not being a resident of the state.

3—In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death."

Various provisions follow concerning the production of and petition for the probate of wills, and among them section 861, which provides that;

"Applications for the probate of a will or for letters testamentary, may be made to the judge of the superior court and he may also at any time issue all necessary orders and process to enforce the production of any will."

By section 862 of the same statutes it is provided that;

"When any will is exhibited to be proven the court may immediately receive the proof and grant a certificate of probate, or if such will be rejected, issue a certificate of rejection."

Section 867 is as follows:

"All the testimony adduced in support of the will shall be reduced to writing, signed by the witnesses and certified by the judge of the court;" and the next section provides recordation in a book to be kept for that purpose, of all wills admitted to probate.

Section 872 of the same statute is as follows:

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will or to the rejection thereof. Issues shall be made up, tried, and determined in said court respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will."

The next section—873—provides that;

"Upon the filing of the petition referred to in the next preceding section a citation shall be issued to the executors who have taken upon them the execution of the will or to the administrator with the will annexed, and to all legatees named in the will residing in the state or to their guardians if any of them are minors or to their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted."

By section 874 it is declared that;

"If no person shall appear within the time aforesaid the probate or rejection of such will shall be binding, save—to infants, married women, persons absent from the United States or of unsound mind, a period of one year after their respective disabilities are removed."

By section 876 it is provided that;

"If, upon the trial of said issue, it shall be decided that the will is for any reason invalid or that it is not sufficiently proved to have been the last will of the testator, the will and the probate thereof shall be annulled and revoked."

3. So it will be seen that the Washington statute makes

express provisions for a contest of any will admitted to probate for any cause affecting the validity of the will, but that this must be done by petition to the superior court, having jurisdiction and administering such estate and the supreme court of Washington so held in the case of

The State ex rel. Stratton, Attorney General, vs. Tallman, Judge, 25 Wash., 295.

who was the judge of the superior court in the state of Washington, administering the Sullivan estate, and the case of

State ex rel. Stratton, Tallman, Judge, reported in 29 Wash., 317.

It will thus be seen that the supreme court of the state of Washington gave to these statutes the same meaning and construction given them by the United States circuit court of appeals. And speaking of the last decision from the supreme court of the state of Washington, 29 Wash., 317, the circuit court of appeals said:

"Here again, the supreme court of Washington clearly indicates that the proper court under the statutes of the state, in which to contest the validity of the will in question, is that department of the superior court exercising probate jurisdiction, and having control of the estate in question."

And your Honors will understand that these two cases by the attorney general, were each the result of the attorney general attempting on behalf of the state, to contest this will of John Sullivan, deceased, so as aforesaid probated, upon the theory that there were no heirs or next of kin and with this will eliminated, the assets of this estate would escheat to the state of Washington.

The circuit court of appeals also quoted with approval, from the case of

In re Alfsted's estate, 27 Wash., 175,

as follows:

"The powers of the superior court in respect to its probate jurisdiction, are the same as they would be if it were in fact a separate probate court. Proceedings in probate matters; in actions in equity and at common law, are distinct, and should not be intermingled except in cases specially authorized by law."

As bearing upon this point the supreme court of the state of Washington, in the case of

Filley vs. Murphy, 30 Wash., 1, on page 5,

used this language:

"In this state, we have no probate court properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called "probate proceedure," *as distinguished from what is denominated civil or criminal proceedure.*"

Your Honors will not overlook the fact that the superior court of King county, Washington, in the probate department thereof, acquired jurisdiction of the estate of John Sullivan, deceased, in November, 1900, and that such court continued to administer upon said estate and was administering upon said estate at the date when this bill in equity was filed in the United States circuit court for the district of Washington, and these appellants recognizing the jurisdiction of the state court, on the same day they filed their bill in equity in the federal court, filed a petition in contest in the probate court, In re estate of John Sullivan, deceased, contesting the will for the same reasons and seeking the same relief set forth and prayed for in the bill in equity in the circuit court.

(See Transcript, page 546.)

And in speaking of the character of such a proceeding, the United States circuit court of appeals in its opinion in

Carran vs. O'Callaghan, et al., 125 Fed., 657,

says:

"A petition to probate a will, is the beginning of a special proceeding, and that the order admitting the will to probate is not final so long as the proceedings may be taken (under the statute) to revoke the probate. In all subsequent stages, the contest is but a part of the proceeding to probate the will and is not a new or distinct proceeding. The subject matter is the same and the ultimate issue, to-wit, whether the will in question should stand as probated, is the same."

Under the laws of Washington, that department of the superior court having probate jurisdiction is vested with the sole jurisdiction over every question involved in this case. In the exercise of the powers with which the constitution clothes the superior courts and under the statue, it must determine all questions relating to the distribution of estates, pass upon the validity of wills, the question of heirship, fraud or any other question affecting the validity of the will and that forum affords an exclusive, complete, efficient, prompt and adequate remedy for these appellants, and they submitted themselves to that jurisdiction by filing a petition in contest in the state court "In re estate of John Sullivan, deceased," on the same day they filed the bill in equity in the federal court, but for reasons known only to themselves, they failed to prosecute the contest of this will in the state court and finally on January 6, 1905, their petition in contest was dismissed in the state court.

The right to contest is found in the following section:

SECTION 6110. CONTEST OF WILL.

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contests the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such

last will and testament under restraint or undue influence or fraudulent representation, or for any other cause affecting the validity of such will." (Bal. Code Wash., sec. 6110; Hill's Code, sec. 876.)

This section 6110 and sections 6347 to 6377, of Vol. 2 of Ballinger's Code of Washington, authorizes the trial and determination in the probate department of the state court, of all questions of heirship, as well as the right to take under wills, and such a contest necessarily requires that court to determine the question of kinship as an issue incident to the right to contest the will and the superior court of the state of Washington, in construing these statutes have uniformly held this to be the law, and that the probate department has the sole and exclusive jurisdiction so to do, as will appear from an examination of the following citations:

Webster vs. Seattle Trust Co., 7 Wash., 651.
Griffin vs. Warburton, 23 Wash., 231.
State ex rel. Stratton vs. Tallman, 25 Wash., 295.
In re Alfred's Estate, 27 Wash., 175.
State ex rel. Stratton vs. Tallman, 29 Wash., 317.
Browder vs. Finney, 30 Wash., 74.
Filley vs. Murphy, 30 Wash., 1.
In re Murphy's Estate, 30 Wash., 9.
Reformed Presbyterian Church vs. McMillan, 31 Wash., 643.

4. The federal courts have never assumed to exercise jurisdiction over probate matters, though in the examination of certain decisions in the various federal courts throughout the United States, in certain instances it might seem that they had, but a careful examination of each of such cases, will, we think, show to the Court that it was owing to some peculiar statute in the one class of cases and in the other a clear mis-

apprehension of what had been decided in certain other cases, and we cite the following:

Bedford Quarries Co. vs. Thomlinson, 95 Fed., 208.
Walker vs. Brown, 63 Fed., 204.
Wahl vs. Brown, 63 Fed., 680.
In re Cilley, 58 Fed., 977, 982, 984 and 989.
Ellis vs. Davis, 109 U. S., 485.
Simmons vs. Saul, 138 U. S., 430.
Broderick's Will, 21 Wall., 503.
Reed vs. Reed, 31 Fed., 53.
In re Aspinwall's Estate, 83 Fed., 952.
Oakley vs. Oakley, 64 Fed., 246.
Blythe vs. Hinckley, 84 Fed., 250.
Wahl vs. Franz, 100 Fed., 680.

We particularly desire to call the Court's attention to the last case above cited in the 100 Fed., which was an action to revoke the probate of a will and cancel the will itself on the ground of fraud, etc., and in certain particulars the case strongly resembles the case at bar, and it was held by the circuit court of appeals, that the probate court had the exclusive jurisdiction to grant this relief and that no jurisdiction existed in the federal courts, and also that such an action was neither a "suit of *civil nature at law or in equity*," within the meaning of the Federal Judiciary Act. We believe this to have been a very well considered case and becomes useful in view of the fact that the question of apparent conflict of authority as to the jurisdiction of the federal courts, is fully and carefully discussed and the authorities pro and con cited, considered and discussed both in the majority opinion and in the dissenting opinion of Judge Sanborn.

5. We also desire to call the Court's attention to the fact that under the laws of the state of Washington, a will may

be probated ex parte, and when so probated, it amounts to nothing more nor less than the institution of a special proceeding, which does not become final for one year, during which time any person interested may file a petition in contest and litigate every question going to the validity of the will, its execution or the probate thereof.

This special proceeding to probate the will, was instituted on March 8, 1901, many months prior to the filing of this bill in equity, and these appellants filed in the state court, their petition in contest of this will and their petition was not disposed of until on January 6, 1905, when the state court dismissed it. And we call the Court's attention to this law, because these appellants will argue that the federal court and the state court have concurrent jurisdiction as to all matters affecting the validity of the will, but we insist that even if this were true as a matter of law, it is also true as a matter of law that whichever court first assumes jurisdiction to determine these questions, that court will proceed to a final determination without any interference from any other court.

The supreme court of California, In re Joseph's Estate, 50 Pac., 786, says:

"We think, without doubt, a petition to probate a will is the beginning of a special proceeding * * * The order admitting to probate is not final so long as proceedings may be taken to revoke the probate."

"In all subsequent stages the contest is but a part of the proceeding to probate the will and is not a new and distinct proceeding."

Higgins vs. Nethery, 30 Wash., 239.
In re Estate of Abbie H. H. Stuart. Hunt vs. Phillips, et al., 34 Wash.., 362.
Zimmerman vs. So. Belle, 80 Fed., 417.
Hughes vs. Green, 84 Fed., 833.
Nugent vs. Phila. Traction Co., 87 Fed., 251.

Marks vs. Marks, 75 Fed., 322.

Taylor vs. Taintor, 16 Wall., 370.

Gamble vs. City of San Diego, 79 Fed., at page 500.

"When the statute requires notice of the proceeding to probate or contest a will, the judgment of the court cannot be collaterally attacked for want of notice if the party not notified may still contest the will by appeal and trial de novo or by a statutory action suit or other proceeding."

16 En. Pl. & Pr., 1004.

Hall vs. Hall, 47 Ala., 290.

Herring vs. Ricketts, 101 Ala., 340.

Dickey vs. Vann, 81 Ala., 425.

Wetmore vs. Parker, 52 N. Y., 450.

This record discloses the fact that all questions to be determined in this action are now or have been pending in the state court of Washington, and were so pending, before the federal court assumed jurisdiction and so far the state courts, in the exercise of the powers and duties lodged with them, have held that the probate court In re estate of John Sullivan, deceased, acquired jurisdiction to probate the nuncupative will and that the decree probating the same found all the jurisdictional facts required by the statute.

It is conceded that the probate court, administering this estate, must distribute the estate and in making a decree of distribution, it must necessarily determine who the heirs and legatees of this estate are, if any there be. So far, the state courts have held the will valid and the nuncupative statute constitutional.

And can it be said that notwithstanding this, the federal court will hold that the probate court had no jurisdiction and annul the decree entered therein to maintain its jurisdiction? It must do so upon the theory that the state court had not jurisdiction, if so, we have these results, the federal court holds

that the probate court had no jurisdiction to probate the will, the probate court holds that it had jurisdiction, and in the exercise of such jurisdiction, the will was regularly probated. Which court will yield? Which decree will become effective? In what way can the federal court make its decree effective? Which court will the administrator of this estate obey? One court has ordered him to distribute this estate to certain individuals and the other court has ordered him to distribute the estate to another, to-wit, to a legatee under the will. Which court will he obey? The circuit court enjoined Marie Carrau from making any claim under the nuncupative will, as probated and the state court holds the nuncupative will valid and that she alone is entitled to the estate. Can it be possible, that the courts even of concurrent jurisdiction, will permit these conditions to exist? Should Circuit Judge Hanford's decision be the law when the state court comes to distribute this estate, will it suspend its own judgment and decree in deference to the federal court?

If the jurisdiction of the federal court can be maintained in this suit, then more than 50 per cent. of disputes over wills can be brought into this jurisdiction and the jurisdiction of the United States circuit courts under the act of 1877 as corrected by the act of 1888 enlarged rather than reduced the jurisdiction.

ABSENCE OF NECESSARY PARTIES.

7. But, conceding for the purpose of argument, that the circuit court had jurisdiction of the subject matter, the record in this proceeding shows that there exists a defect of necessary parties who if made parties at once ousts the court of its jurisdiction on the ground of citizenship. Marie Carrau is a citizen of the state of Washington, and Eugene Timothy Sullivan and his sister are each citizens of the state of Washington, and each claiming to be the only heirs of the deceased Sulli-

van, and claiming the whole of the estate against Marie Carman, the sole legatee under the nuncupative will, and these facts appearing, the federal court is ousted of its jurisdiction and the circuit court should have declined to proceed further for that reason, and these facts do appear affirmatively in the pleadings. As was pointed out by the circuit court of appeals, in reversing the decision of Circuit Judge Hanford, Eugene Timothy Sullivan and his sister were necessary parties to the litigation and we think it can scarcely be disputed that it was necessary to have all the adverse claimants before the court before any determination as to the rights of any claimant in and to this estate could be determined. The circuit court held that these appellants were first cousins, and to that extent, that question was litigated against Eugene Timothy Sullivan, his sister and all other claimants without their being before the court. The circuit judge based his right to maintain jurisdiction upon his construction of the following cases:

Payne vs. Hook, 7 Wall., 425.

Gaines vs. Fuentes, et al., 92 U. S., 10.

Byers vs. McAuley, 149 U. S., 620,

and the case of

Richardson vs. Green, 61 Fed., 423,

S. C. 159 U. S., 264.

(See opinion of Judge Hanford, Transcript, page 122).

But, as pointed out in the opinion of the circuit court of appeals in this case, none of these citations support the circuit court's conclusion.

In the Byers case, the supreme court of the United States held that the circuit court erred in taking any action or in entering any decree looking toward the administration of the estate or attempting to adjudicate the rights of citizens of the state as between themselves. But because it ap-

pears that the debts of the estate had been paid and the estate was ready for distribution but that no adjudication had been made as to the distributees and speaking of these conditions, the court said:

"In that exigency, the circuit court might entertain jurisdiction in favor of all citizens of other states to determine and award their shares in the estate. Further than that, it was not at liberty to go."

We think we are justified in concluding that in the Byers case, all necessary parties were before the court, at least no question of this nature was presented or considered, and in speaking of this matter, the circuit court of appeals says:

"In the case at bar, however, there were persons not made parties to the suit who claimed to be the sole and exclusive heirs of the deceased and who if made parties would, on the ground of citizenship, oust the federal court of any jurisdiction in the premises. If any of those claims be well founded, it would of course, result that the claimants were therefore essential parties to the controversy, concerning the heirship in question, and we think counsel for the appellees (appellants here) altogether mistaken in saying that there is anything to the contrary in Byers vs. McAuley or in the case of Payne vs. Hook."

Carran vs. O'Callaghan, 125 Fed., 656.

We think this Honorable Court very clearly announced the doctrine for which we contend in the case of

The State of California vs. The Southern Pacific Company, 157 U. S., 229,

in which the court used this language:

"Can the court proceed to a decree as between the state and the Southern Pacific Company and do complete and final justice without affecting other persons not before the court or leaving the controversy in such condition that its final termination might be wholly inconsistent with equity and good conscience."

In the above action it was plainly apparent that a decree in the case could not directly affect the city of Oakland, because the city was not a party to the action, but by making the

city of Oakland a party to the suit, the federal court would have been ousted of its jurisdiction, and the court says:

"We have no hesitation in holding that when an original cause is pending in this court, to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication, to proceed in the absence of parties whose rights would be in effect determined even though they might not be technically bound in subsequent litigation in some other tribunal."

But the decision of the circuit court in determining that these appellants were the first cousins of the deceased, upon the face of the decree, took so much interest in the assets of this estate away from the other claimants by establishing that they were heirs and entitled to inherit, and while they would not be technically bound by the decision of the circuit court, because they were not parties to the litigation, still such a decision would complicate the litigation growing out of the various claims made to the estate and result in a multiplicity of suits, and the decision of the federal court would therefore accomplish nothing, and it would be in violation of the plain principles of law, that all parties in interest must be brought before the court, so that the court may be enabled to make a complete decree between all the parties in interest concerning the subject matter, and in speaking of this principle and procedure, Justice Lamar, in the case of

Gregory vs. Stetson, 133 U. S., 579,

quoting from Story's Equity Pleading, says:

"By this means (having all parties in interest before the court) the court is enabled to make a complete decree between the parties to prevent future litigation by taking away the necessity of a multiplicity of suits and to make it perfectly certain that no injustice is done either to the parties before it or to others who are interested in the subject matter by a decree which might otherwise be grounded upon a partial view only, of the real merits.

"The general question involved therein, has been before this court a number of times and it is now well settled that notwithstanding the statute referred to and the 47 Equity rule the circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby."

8. The pleadings disclose the following facts:

a. That the subject matter of the litigation between these appellants and Marie Carrau, respondent, is a probated will dividing the assets of an estate situate wholly within the county of King, in the state of Washington, over which the state court assumed jurisdiction, not alone as to the subject matter, but as to all persons claiming any interest in the subject matter.

b. That in said state court, a large number of claimants are contending against Marie Carrau, for the assets of said estate, each one claiming to be the sole heir of Sullivan, deceased, and that among these claimants is Eugene Timothy Sullivan, a citizen of the state of Washington, who for himself and sister, is seeking to contest the will and secure the property, upon the claim that he and his sister are the sole heirs at law of the deceased. And that the other claimants are citizens of almost every state in the Union, as well as of Canada, and a number of foreign countries, but that none of these claimants are parties to this litigation.

c. That a nuncupative will was admitted to probate and a decree regularly probating the same, entered by the state court many months before these appellants filed their bill in the federal court.

d. That the real purpose of this bill is to contest that will so probated, and to set aside the decree probating it, and to cause a decree to be entered in the federal court which will furnish the basis to compel the state court, if necessary, to distribute the whole of the assets of said estate to these appellants.

c. And from these facts, two things are apparent:

First—That no decree can be entered here which will be binding upon the other claimants of this estate who are not parties hereto, and yet a decree in favor of these appellants would indirectly affect the rights of every individual who claimed to be the sole heir at law of the deceased; and,

Second—That if the claimants were made parties to this suit , the court would be ousted of its jurisdiction by reason of citizenship.

9. Based upon these conceded facts, we respectfully contend for the following propositions of law, which represent the principles of law, announced by the circuit court of appeals, in reversing Circuit Judge Hanford:

"A court of equity will not assume jurisdiction to determine any matter unless such determination will be a complete and final determination of all the matters involved, both as to the subject matter and the persons interested, and if it appears at any time that other parties are necessary parties to a full and complete adjudication they must be added or brought in, and if by bringing them in the court would be thereby ousted of its jurisdiction, the action must be dismissed."

Morgan's Heirs vs. Morgan, et al., 4 Law Ed. U. S., 242.

Marshall vs. Beverly, 5 U. S. Law Ed., p. 97.

Russell vs. Clark's Extrs., 3 U. S. Law Ed., 271.

Shields vs. Barron, 15 Law Ed., 159.

Mallow vs. Hinde, 12 Wheat., 197.

Cameron vs. McRoberts, 3 Wh., 591.

Hardy vs. Handy, 11 Wh., 132.

Elmdorf vs. Taylor, 23 U. S., 167.

State of California vs. Southern Pacific Co., 157 U. S., 229.

Gregory vs. Stelson, 133 U. S., 579.

Picquet vs. Swan, 5 Mason F. C. No. 11, 135.

Peasley vs. Shively, (Ore.) 26 Pacific, 846.

Stallcup vs. Tacoma, 13 Wash., 153.

Consolidated Water Co. vs San Diego, 93 Fed., 849.

Collins Mfg. Co. vs Ferguson Trustees, 54 Fed., 721.

10. As to the necessity of having all persons legally or beneficially interested in the subject matter of a suit before the court, and as to the principles of law involved, we cite the case of the State of Minnesota vs. Northern Securities Co., usually referred to as the "Merger Case," in which the court uses the following language:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it so that there may be a complete decree which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits and to make it perfectly certain that no injustice is done either to the parties before it or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the merits.

"This is founded upon clear reasons and may be enforced by the court sua sponte though not raised by the pleadings or suggested by the counsel."

State of Minnesota vs. Northern Securities Co., 194 U. S., 48.

We here suggest to the Court, that all questions with reference to kinship or of the legal sufficiency of this will, are pure questions of law and not of equity, and therefore, the Court in any event, would be unable to grant equitable relief, because the only question that could possibly give this court equitable jurisdiction, fails for want of parties who, if added, would oust the court of jurisdiction, on the ground of citizenship, and this doctrine is well stated in the case of Mitchell vs. Dowell, in the following language:

"The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out, cannot, for defect of parties or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law."

Mitchell vs. Dowell, 26 U. S. L. E., 1142.

Kramer vs. Cohn, 30 U. S. Law Ed., 439.

Cherokee Nation vs. Southern Kan. Ry., 33 Fed., 915.

Alger vs. Anderson, 92 Fed., 711.

Gamage vs. Harris, 11 Atl., 423.

Reay vs. Raynor, 19 Fed., 308.

The statute of Washington, in force, enacted March 9th, 1891, provides for contest of wills as follows:

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction ,contest the validity of said will, or pray to have the will proven that has been rejected, he shall file a petition containing his objections and exceptions to said will, or to rejection thereof. Issues shall be made up,tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will."

2 Hill's Code, sec. 872, p. 390.

The probate court of King county acquired jurisdiction of the subject matter and probated the will, with an open door to all interested parties to enter that court within one year and raise all questions, and until these appellants attach themselves to the subject matter, and litigate the validity of the decree of probate and their alleged rights to the property in the state court, that decree must stand as a finality and deprives any court of jurisdiction except a court of appellante jursdiction, to review the decision of the probate court.

Gaines vs. New Orleans, 6 Wallace, 642.
Southworth vs. Adams, 4 Fed., 3.
Wahl vs. Franz, 100 Fed., 680.

If this Honorable Court passes upon the question of jurisdiction of the circuit court, and reverses the circuit court of appeals in this particular, the case will then no doubt, be sent back to the circuit court of appeals, which court will then pass upon the merits of the appeal aside from the question of jurisdiction, but recognizing the possibility of this Honorable Court passing upon the merits aside from the question of jurisdiction, without returnng the case to the circuit court of appeals, we beg leave briefly, to call the Court's attention to our position as to other questions involved in such consideration.

The bill in equity seeks to raise the question of the constitutionality of the act with reference to nuncupative wills in the state of Washington. The federal court has not only been asked to review and set aside the action of the probate court, with reference to said will in admitting it to probate and to vacate and set aside the decree, but it has also been urged to pass upon the constitutionality of the act of the legislature relating to nuncupative wills in advance of the state court, notwithstanding the record discloses the fact that this queston is pending in various forms before the state court and that the state courts have so far held the will valid, the decree proper and the law constitutional, and we urge upon this Court that under such circumstances the federal court will refuse to pass upon the question of the constitutionality of this law and when it does will follow the decisions of the state court and the follownig authorities sustain this contention:

Pelton vs. National Bank, 101 U. S., 143; 25 Law Ed. 901.

Cummings vs. National Bank, 101 U. S., 155; 25 Law Ed. 904.

Hills vs. Exchange Bank, 105 U. S., 319; 26 Law Ed. 1052.

Western Union Telegraph Co. vs. Poe, 61 Fed., 469.

Same case, 64 Fed., 11.

The case last cited, presented to the circuit court the question of the constitutionality of a certain state law but the federal court for many months withheld its decision with reference thereto, awaiting the action of the state court, but finally did pass upon the act, holding it unconstitutional, but thereafter the state court passed upon the act and held it constitutional, whereupon the federal court reversed its former ruling and rendered a decision in harmony with that of the state court and because the state court so held.

State Railroad tax cases, 92 U. S., 575, 617 and 618.

Buserman vs. Bank, 147 U. S., [illegible].

Moores vs. Bank, 104 U. S., 625.

Stutsman vs. Wallace, 142 U. S., 293.

Saydam vs. Williamson, 24 How., 427.

Fairfield vs. County of Gallatus, 100 U. S., 47.

IS THE ACT CONSTITUTIONAL?

The act containing the section relating to nuncupative wills was first passed in 1854, Session Laws Territory of Washington, p. 512. This act not only embraced matters relating to the execution of wills, etc., but also covered other questions of descent, court practice, etc. In 1860 the law of 1854 was re-enacted under substantially the same provisions (Laws 1860, p. 165) under the title "An act defining the jurisdiction and practice in the probate courts of Washington Territory." In 1863 substantially the same subject matter was gone over under

the same title of the act of 1860. (Laws of 1863, p. 198.) In 1873, under the same title as the last act substantially the same subject matter was re-enacted with the change wrought in the section relating to nuncupative wills by dropping out the "nor" in the third line of said section, leaving it without limit as to the amount and character of the estate which could be devised under such a will, when properly proven under the provisions of the act, and the act of 1873 has been incorporated into every legally authorized codification of the laws of this state since that date. The section in question appearing in the Code of 1881 as section 1329, in Hill's Code, as section 1469, and in Ballinger's Code as section 4605. Conceding for the present that the section in question is not within the scope of the title to the act of 1873, we maintain that the enactment into the Code of 1881 of the same provisions made it the law upon that question, and that section 1329 of the law of 1881, has, ever since the adoption of that Code, been the law of this state. It is true that under the provisions of the Code of 1881 prior laws incorporated therein were not new enactments, but were to be construed as continuations of such laws, but this provision makes no difference with the point we make.

If it be contended by complainants that the law of 1854 is the law, then we say that such was never incorporated in the Code of 1881, and therefore cannot be the law, and the legislature having enacted a provision in the Code of 1881 in the place of the act of 1854, such provsion becomes the law. The supreme court of Washington, to our mind, has fully confirmed our position in the case of *Philbrick vs. Andrews*, 8 Wash., 7. It will appear from that case that under the laws of 1877, a person claiming a homestead was required to enter on the margin of the record the word "homestead" in order to make

the claim good. This provision was dropped from the Code of 1881 and another incorporated in lieu thereof to the effect that such homestead might be selected at any time before sale. The supreme court held that the change in the Code repealed the former act.

See also *Marstor vs. Humes*, 3 Wash., 267.
Grantz vs. McKenzie, 3 Wash., 194.

If the law of 1854 was in force then it was dropped out of the Code and another took its place just as was done in the case of the homestead provision. The contention of complainants that the law of 1873 was invalid adds no force to their position nor does it weaken respondent's in the least, for it may have been that very reason which caused the legislature to give a new expression to the same subject matter in the Code. To contend otherwise would be to take the illogical position that the legislature would have no power to relegislate upon the subject matter of a void act, or if it did so, such legislation would be of no force or effect, because perchance some former act covering the same subject matter had a bad title. The case of Philbrick vs. Andrews is the only case in this state wherein the question as to conflict between the provisions of the Code of 1881 and the prior laws has ever been considered, so far as we have been able to ascertain. All the other cases, commencing with the case of the *State vs. Rosencrantz*, 2 Wash. Ter., 267, down to the case of *In re Moore*, 81 Fed., 356, have been cases bearing upon the sufficiency of enactments since the Code of 1881.

The Codes of 1881 and Hill's Code are recognized as valid compilations of the laws of the territory and state, and have always been considered and recognized as the law.

Marstor vs. Humes, 3 Wash., 267.
State vs. Halbert, 14 Wash., 306.

But the title of the act of 1873 was sufficient to comply with the requirements of the organic act.

"The organic act of the territory required nothing more than that the one particular object of the law should be expressed in the title and did not require the title to specify minutely the means by which it was proposed to reach the object in view."

In re Moore, supra.

Under the foregoing rule we claim the title sufficient. The object embraced in the title was to define the jurisdiction and practice of the probate court. If the probate court was vested with authority over wills and estates as an inherent power, which must be admitted, then it becomes necessary to define what acts were necessary to bring a purported will within its jurisdiction as a valid will, and this could not be done wthout prescribing the formalities that were necessary in its execution and proof. The pointing out of all those things were necessary and incidental to defining the jurisdiction and practice relating thereto. It seems to us that the only way this contention can sucessfully be met is to argue that the subject of wills could not be in any way covered by a title defining the jurisdiction and practice of probate courts. If such a title could cover anything relating to wills, then it would surely cover formalities in their execution necessary to admit them to probate. The law as well as general knowledge and custom has always recognzed that the subject of wills has been a branch of probate law. Then why should not the subject of wills come within such title as well as any other recognized and inherent branch of the probate court law? If some subject not germane to the general question should have been incorporated into the act, as for instance, a matter relating to attachments in civil proceedings for collection of debts, divorce or crimes and misdemeanors, subjects which the ordinary layman

would not think of looking for in a probate code, then we would concede the point well taken. Suppose that the legislature had used the title "An act to adopt a probate code," could it be sucessfully contended that the title would not be sufficiently comprehensive to cover a provision prescribing formalities necessary in the execution of wills to admit them to probate? Yet the title in question amounts to the same thing, and is just as comprehensive. The object of the constitutional provision is to prevent surreptitious legislation by running something into an act of which no one would have notice. The title to the act is the notice, and if such title is reasonably effective to give notice the requirements of the constitution have been fulfilled. Is there a person, be he judge, practitioner, legislator or layman, who would not first of all look for and expect to find some provision under the title in question relating to the execution, validity and proof of wills?

"The object should be grave and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment, upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title."

Montclair Township vs. Ramsdell, 107 U. S., 147.

The above case states the rule as quoted and which has been almost universally adopted. It is further shown in the above case that under the title "An act to incorporate a certain township," any power could be conferred or any act delegated to such township which could legally be vested in it.

In *Harrison vs. Harrison,* 47 Minn., 575, 28 A. St. Rep., 382, we find a case directly in point because of the great similarity of the title to the act and its provisions to the title and act in question.

The act there was entitled "An act to establish a probate code," and embraced 21 sub-chapters containing 326 sections

covering the law of wills, their probate, descent and distribution and fixing and establishing property rights and guardianship. These questions were all held to be germane to the title of the act. The court says:

"The law of wills and of title to property by descent is a part of the law relating to the estates of deceased persons and hence is, in popular understanding, if not legally, a part of the general subject of probate law."

To the same point see *Central Ga. Ry. Co. vs. State*, 31 S. E., 531.

Hudnall vs. Ham, 49, 985, in which it was held on the same principle that a provision in an act to the effect that a marriage "shall be deemed a revocation of a prior will," comes within the title of "An act in regard to descent of property." If the provisions of the act are germane to, referable and cognate and come under the general idea of the title and would naturally be suggested by it, they are not open to question.

Walnut vs. Wade, 103 U. S., 683.

Unity vs. Burrage, 103 U. S., 447.

Tabor vs. Commercial Nat. Bank, 62 Fed., 383..

Antonia vs. Mchaffy, 96 U. S., 312.

Hronek vs. People, 134 Ill., 139.

Jones vs. Aspen Hdw. Co., 21 Colo., 263, Am. St., 220.

Richman vs. Supervisors, 77 Ia., 14, Am. St., 308.

Hellman vs. Shoulters, 114 Cal., 136.

Van Brant vs. Flatbush, 128 N. Y., 50.

Woodruff vs. Baldwin, 23 Kan., 491.

Paxton, etc. Land Co. vs. Farmers' Land Co., 45 Neb., 884, 50 Am. St., 585.

Washington supreme court has laid down substantially the same rule as announced in the above cases.

Commissioners vs. Davies, 1 Wash., 290.

State vs. Spokane Falls, 2 Wash., 40.

Marston vs. Humes, 3 Wash., 267.
Maling vs. Crummey, 5 Wash., 222.
Seymour vs. Tacoma, 6 Wash., 138.
State ex rel. vs. Whittlesey, 17 Wash., 447.
Swinburn vs. Mills, 17 Wash., 611.
Lewis County vs. Gordon, 20 Wash., 80.
Skagit County vs. McLean, 20 Wash., 92.

Considerable stress has been laid on the case of *Anderson vs. Whatcom County,* 15 Wash., 47, as sustaining complainants' contention. We submit that this case presents an illustration where the act complained of went clearly and unmistakably beyond the scope of the title. The court saying that the title 'would not suggest to the mind the question of salaries in any respect."

Our statutes with reference to wills will be found as follows, Ballinger, section 4594:

"Every person who shall have attained the age of majority, of sound mind, may by last will devise all his or her estate, real and personal."

Section 4595:

"Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

Section 4605 says:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of $200, unless the same be proved by two witnesses who were present at the making thereof, and that it be proven that the testator, at the time of pronouncing the same, bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness, and at the dwelling house of deceased, or where he had been residing for a space of ten days or more, except where such person was taken sick from home and died before his return. Nothing herein con-

tained shall prevent any mariner at sea or soldier in the military service, from disposing of his wages or other personal property by nuncupative will."

These sections were all enacted by the legislature of the territory of Washington, in 1854, and were codified and carried in the Code of 1881. From this section it will be noticed that a person may bequeath an estate which does not exceed $200, without any requirements whatever, with reference to its proof, etc., but where the estate exceeds $200, then the statute provides the number of witnesses, the time of making, the time of proof, and the place where made.

The objections urged against this nuncupative will do not relate to the regularity of its execution, nor is it contended that it is insufficient or that the proof was insufficient, but as we understand the position of the solicitors for the complainants, they insist only that the will was never made. In other words, the persons who were called as witnesses and by whose evidence the will was established, were perjurers, because the very circumstances surrounding all of them and the making of this will are such as to make it appear unreasonable that it was ever made. But the Court will be slow to convict these people of perjury because of the opportunity they had to commit perjury. Not a single statement made is inconsistent with truth. It must be admitted that all these things might happen any day. The fact that it is unusual would not make it unreasonable. The fact that this estate is valuable would only add to the inducement. It would not affect the weight to be given to the testimony. The law itself is a reasonable one. Its provisions are reasonable, the very things required to be said and done are the perfectly natural things to be said and done, by any one realizing the approach of death. It was but natural that Sullivan should have some one present, bear witness.

The very desire to give his property to the lady he intended to make his wife, would suggest that he made the statements he did make, and in the manner he made them, and an examination of Sullivan's letters, made exhibits, will show his command of language and power of expression. But the evidence as to the making of the will is corroborated in many particulars by the evidence of Father Sweere, the spiritual adviser of Miss Carrau, and the evidence of Mr. Kelleher, the lawyer who was consulted immediately after Sullivan's death, to find whether or not an oral will was valid in Washington.

THE VALIDITY OF THE NUNCUPATIVE WILL.

In the first place the term "estate" used in this law is broad enough to include all kinds of property as well as choses in action, and the supreme court of Washington has determined that the word "estate" includes every character of property. It is contended by solicitors for complainants that the phrase "estate bequeathed" used under section 4605, Ballinger, limits the meaning of the whole section; but that is upon the theory that the term "bequest" under the old rule of interpretation, applied only to personal property, while the term "devise" applied only to real property. But it will be remembered that the reason for the old rule was found in the statutes of 32 Henry VIII. and statutes 29 Car. II.

Sections I. of the former and V. of the latter provided that lands or tenements should be devised only in writing, as follows:

"That all devises and bequests of any lands or tenements devisable either by force of the statute of wills or by this statute or by force of custom of Kent or the custom of any borough or any other particular custom *shall be in writing* and signed by the party," etc.

So it will be seen that under those statutes, wills were re-

quired to be in writing. These provisions were purely statutory and governed then, and statutory provisions must govern now. An examination of these two statutes and section 4605 of Ballinger's Code of Washington will disclose the fact that those provisions are omitted from our statutes, and we insist that had the legislature intended that nuncupative wills should not pass real estate, it would have enacted into our law at least the substance of the above sections.

It will not be seriously controverted that when the legislature has spoken on any subject matter and omitted certain provisions, contained in the common law, that the legislature acted intelligently and omitted for a purpose, and certainly the Court would not be justified in reading into an act of the legislature that which is omitted. We think the reasonable presumption is that when the legislature enacts a statute, the substance and necessity of which is gathered from the common law, and omits certain restrictions or substance, that it does so intelligently and for a purpose apparent upon its face. Certainly there can be no good reason offered why real property should not be devised by nuncupative will as well as personal property, under our statute. Under our form of government, an individual's property may consist wholly of one class or the other. It may be all personality or all realty, and there can be no reason why the legislature should not enact a law permitting the owner of property to devise all he possesses by nuncupative will, and *we earnestly contend that nothing short of statutory affirmative provision can limit a nuncupative will to personal property.*

2d Ballinger, Sec. 4783, provides that the common law shall be the rule of decision.

In the case of *Gillis and wife vs. Weller*, 10 Ohio, 463, the court held that under the statutes of Ohio, a nuncupative will

devised real property. This decision is based upon an act of the legislature of February 26th, 1824. The court, in discussing this case, sets forth the various years during which nuncupative wills in the state of Ohio devised personal property only, as well as the years when such wills devised both personal and real property, and used the following language:

"The act of 1808 repeals the law of 1805, and prescribes the mode of execution of a verbal will without any direction as to the nature or limitation of the estate it may operate to convey. The first section of this act provides, however, that every person, etc., shall have power by such will and testament in writing to dispose of both real and personal estate. If personal property were not here enumerated, it might be contended, perhaps, with some plausibility, that a verbal will was not intended to pass realty, but as the term *written* as used in this section applied to both species of estates, and as the act makes provision for the due execution of a verbal will, and leaves it without restriction as to what may pass under it, it would seem to be general in its application, and nothing short of statutory provision can limit it to the personality."

The same provision is copied into the acts of 1810, 1816 and 1824 in relation to verbal wills.

This decison was approved in

Ashworth vs. Carleton, 12 Ohio St., 381.
Bellamy vs. Peeler, 96 Ga., 467.

In all the courts, so far as we have been able to discover, it has been held that real property might be devised by nuncupative will, and all decisions against this contention are based upon statutes which require, like the English statute, that all wills devising real property should be in writing. An examination of the decisions, we think, will establish the fact that wherever the states have enacted the statutes from England, and included the provisions that require wills to be in writing, the courts have agreed that nuncupative wills would devise only personal property. Otherwise a different rule applies.

Smithdeal vs. Smith, 64 N. C., 57 and the case of *Pierce vs. Pierce,* 46 Ind., at 86.

It was held that nuncupative wills would not devise real property, but each was based upon the statute, and for the reason that the statutes in each of these states, require that wills devsing real property, shall be in writing, a nuncupative will cannot devise real property.

In a few of the states where this statute has been construed, the courts have held that the change was so radical that the court could not believe that the legislature intended that one might devise real property by a nuncupative will. But the same reasoning might apply to every radical change made by the various legislatures in this Union.

In the case of *Lewis vs. Aylott,* 45 Texas, 190, the court reached this conclusion not only by reason of the statute with reference to descent of property, but it coupled therewith the statute with reference to conveyances, and upon the theory that there were but two methods of acquiring title to property—one by descent and one by purchase—and then further holding that the party taking by devise is deemed to take by purchase, and because the statute required the purchase to be evidenced by a writing, the court concluded that a nuncupative will could not devise real property. But we insist that reasoning is not sound and does not harmonize with modern construction given by the various courts throughout the Union.

It is also agreed that because the statute of wills and the statute of frauds have been adopted by the states of the Union (notwithstanding the very great modifications noticed) that a nuncupative will should pass only personal property.

Appellants will no doubt, cite to the Court, the case of

Price vs. Hazelton, 20 Johnson Reports, 501,

but a careful examination of this decision will convince the

Court that the conclusion reached has no possible bearing on the case at bar. That decision goes into the motives which prompted Jones to give his property to this woman, and for this reason the will is severely condemned. It bears upon its face everything but the decision of a well balanced judicial mind. Every circumstance which is condemned in that decision as furnishing a reason or an excuse for such a will is absent in the case at bar. To the Jones will there were urged two objections: First, that the "last sickness" under the statute, means sudden illness when the testator is in extremis and in the immediate prospect of death, and, secondly, that the will is void, because no executor is named.

So far as the circumstances surrounding the will of Sullivan are concerned, it is neither strange nor extraordinary. Here was a man sixty years of age, he had never had the comforts or advantages of a home; he had never felt the influence of the associations of cultured women, and it is not strange that he should center his affections upon Miss Carran. The attachment which he formed for her and she for him, was not out of the ordinary. By the very strictest economy he had acquired a fortune, and at his age it was perfectly natural that he should look around and devise means by which the rest of his life should yield him some comfort and pleasure. Miss Carran was a lady of culture and refinement; she was educated; she was engaged in teaching Mr. Sullivan French; she was thus thrown in his company, and in order that he might make greater progress he evidently desired to live in the home where French was the conversational language, believing that this would enable him the more rapidly to converse in French. And under all the circumstances we insist that it was the most natural thing for these two people to become attached to each other. Whether he had any heirs in

his native country is exceedingly doubtful; at least he thought he had none, and if he had, it is perfectly evident that he had no sympathy with or interest in them. It affirmatively appears from the evidence that not a single human being except Miss Carrau, had any hold on his affections, so as to become the object of his bounty. He was soon to be married to Miss Carrau, and under these circumstances, the days and weeks he lived in this dwelling where he died, were no doubt the happiest hours of his life. It is apparent that he had a strong apprehenson that his end was near, on the night when he called these parties to his room, and it seems to us that this devising his property to Miss Carrau was nothing but natural.

This Court will not erect itself into a tribunal to declare that the testator ought not to have devised his property in this manner or to this person. And we insist that this Honorable Court will not feel itself at liberty to disregard the testimony in support of this will, unless the same shall be successfully impeached according to the rules which govern a court of justice. The fact that there is some contradictory testimony on some points ought not and will not excite the surprise of the Court; it was to be expected. It comes with poor grace from those who opened graves and disturbed the dead in order to find some evidence that would establish the relationship of their clients to Sullivan, to charge Marie Carrau and the witnesses with perjury in their briefs. There is not a single statement in this testimony on the part of Miss Carrau, and her immediate family, that is inconsistent with truth. And we feel that this Honorable Court will charitably attribute any seeming discrepancies in this testimony to causes of misapprehension or mistake owing to their inability to understand English. Credible and intelligent witnesses take different views of the same circumstances and the same transactions, and in

many minor particulars, they do not agree. But we think courts generally look upon these discrepancies as the highest evidence of the truth of the important particulars. But there is no proof of fraud or imposition, there is no proof of conspiracy. There is nothing to impeach or discredit the witnesses. In Sullivan's selection of Miss Carran to become his wife, we have no concern. And his wishes in the hour of his death to bestow upon the woman he loved the accumulations of a life time, ought to be recognized by this Honorable Court as a duty both to the living and the dead.

It is contended by the solicitors for appellants, that a nuncupative will under the laws of Washington, if valid at all under the statute, devises only personal estate and does not devise real property and they seem to urge that fact as tending to invalidate the will, but while we insist that the statute containing the nuncupative will clause is constitutional and that it is impossible to hold that such a will does not devise real property without injecting into the statute words which the legislature omitted, still this objection would not go to the validity of the will. The will would be valid, not void, and be recognized by the courts to the extent that it did devise personal property. If appellants' construction of the statute is correct, this will would be ineffectual as to the heirs so far as the real property is concerned, and the will would be effectual for every other purpose. This construction would not furnish grounds for annulling the will or vacating the decree probating it. In no sense can this will be said to be void, and this question was squarely before the supreme court of the state of Washington, in the following cases:

Bower vs. Bower, 5 Wash., 225.
Barnes vs. Barker, 5 Wash., 390.
Hill vs. Hill, 7 Wash., 410.

Purdy vs. Davis, 13 Wash., 165.

Morrison vs. Morrison, 25 Wash., 472.

The testimony as to the will by Marie Carran is as follows: (Trans., 270.)

A. The night before he died, about eleven o'clock I think he told me to call my brother and my sister and the family, and I went to the rooms—and he wanted to see them to speak to them, and I went to the hall and called down the steps and called my brother, for them all to come up, and they ran up stairs quite excited, and I told them that Mr. Sullivan wanted to speak to them, and then they came in the room and Mr. Sullivan spoke to them these words:

"I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carran. I am sick, very sick, and I do not know what might happen."

Q. What further was said?

A. My brother said—I think my brother or sister said, "Thank you," and they walked away. They went out.

Q. Did you go out?

A. No, I remained for a little while. I remained about five or ten minutes. I could not say—I could not speak a word. I could not have spoken a word to save my life. He did not speak; he seemed very much exhausted and still. I told him that I was going to get some warm milk for him. He was very weak and he was breathing very heavily, so I thought some milk would do him good and help him. I went down stairs and had a little milk warmed for him and then I came up again and found him in bed and asleep; he had gone asleep.

Q. When next did you talk with him and what did you do—did you wake him up?

A. No, I did not wake him up. The doctor had told me to let him sleep if he wanted to sleep.

Q. When did you give him his medicine?

A. I was going to give it to him at two o'clock in the morning. I gave the medicine every six hours, but he was asleep, so I did not arouse him.

Q. Were you in to see him at two o'clock in the morning?

A. Oh, yes, I was in all the time there, you know—almost every five minutes, I went in. (271.)

Q. Now, did he continue to sleep on from that?

A. Yes, sir, slept all the time.

Q. Now, in what way was he sleeping—heavy, deep sleep?

A. Yes, sir, very deep, it seemed to me, but breathing very heavy, always very hard. He was breathing pretty hard, kind of a drowsiness more than anything else, I thought.

Q. Now, when he woke up, if he woke up again?

A. Well, I went to bed—I did not go to bed, but I retired to my room.

Q. The adjoining room?

A. Yes, sir.

Q. Who was rooming with you, if anyone?

A. My sister, in the same room, and I retired then, but I did not go to bed, but just put my morning wrapper on and laid down on the bed. I could not go to sleep. I tried to read but I could not read very well. I could not read at all. I listened for him and I heard no noise in the room only that he seemed asleep and quiet. I did not hear him moving at all. So I stayed in bed for quite a while and then I went asleep, and I think I slept although my sleep was so disturbed, and then I went to his room at seven o'clock, at about seven o'clock, but he still slept, but I roused him.

Q. You roused him?

A. Yes, sir, but he did not seem to rouse at all.

Q. Did not seem to talk?

A. No, he did not sem to be able to answer or to do any-

thing. I told my sister to bring his breakfast and try to have him take some little breakfast. And she brought breakfast. She always did. She brought the tray and I tried to feed him, to give him some egg—he always ate soft egg—and I brought one in a glass and tried to put a spoonful in his mouth, but he did not want it, he could not swallow it. And so I fixed the bed and I fixed everything in the room to make everything straight for the doctor when he came, and it took a little time, and then I went to my room and I came in the hall, and he did not seem to wake up and he did not wake up. At about eight o'clock—I think it was about eight o'clock—I asked him—he seemed to rouse a little, then I says:

"I am going to give you some beef tea, that may help give you strength," and I had given him beef tea quite often. The doctor had told me to.

Q. Well, what did he do then?

A. Well, then I went down stairs and warmed the tea and then I (272) ran up stairs again, and when I opened the door I found him—I did not know that he was dead, but I saw that his eyes were steady and I went up and tried to revive him. I thought that he had fainted and then I tried to revive him and chafed his hands and tried to give him—he had dropped his head that way—and I tried to lift up his head, and when I lifted it it dropped again and he seemed to look at me with a pitful look, and I do not know that he was dead, but I thought maybe there would be a chance to revive him. WhenI saw that I could not do anything for him then I ran down stairs and I first said, "My God! My God! he is dead." And then I ran down stairs and called my sister. And my sister said he was dead, and I says, "Don't say that to him; he may still be alive and hear you." I could not believe that he was dead; it was impossible for me to believe it, and I went

to him and told my sister to bring some vinegar. We always do that in France, to make them smell vinegar when they are fainting, but he was not fainting; he was dead. Then my sister called Mrs. Eames and my sister asked her what to do, and she said, "I will call the doctor," and I went down stairs and I knew the doctor's telephone number and I called for the doctor, and Mrs. Eames came and spoke to him because I could not understand what he said, and I went up stairs to him again.

These facts are also testified to by Louis Daussat (345), Hermance Carrau (438), Mrs. A. Daussat (464), and no evidence was offered to dispute or impeach these people, and their standing for truth and integrity was such that the appellants dared not attack them.

Q. Now, the night before his death, when he spoke these words that you have detailed, what did you do that night, after the folks had gone down and remained, what did you do about going down? (273.)

A. I went down and I took a pencil and a scrap of paper, and then I wrote down the words just as he said them to me.

A. I went down stairs, in what we call the sitting-room, and I opened the desk, the writing-desk, and I wrote the words.

Q. Now, what did you do about communicating, if you did communicate these facts to anyone, who did you communicate them to first and when?

A. Oh, I told Father Sweere.

Q. When and where?

A. It was in my house just after poor Mr. Sullivan died.

Q. Do you remember the time of day it was?

A. It was in the morning.

Q. What did you tell Father Sweere?

A. I told him of the will, the words just as they were,

and I requested him to have the kindness to go and see a lawyer for me and ask if that was a good one. Then he went, I think, and asked Mr. Kelleher, and Mr. Kelleher said it was not a good will.

Q. You need not state what he said to Mr. Kelleher, but state what he said to you?

A. He came on Saturday, the 29th, Father Sweere, and told me what he had learned, that the will was no good, that the oral will was no good.

Father Sweere testifies to the same facts and with reference to Sullivan's death, etc. (Trans., 219 and 220.)

Q. When did you learn first of his death?

A. I saw it in the morning paper.

Q. When?

A. Well, I think—I do not know that it was the evening paper or the morning paper, but I saw it, and I think it was the morning paper, the day after he died, you know.

Q. What did you do, if anything?

A. I went to see Miss Carrau that same morning as soon as I saw it in the paper, to see in what condition she was.

A. I found her very much dejected on account of the death of Mr. Sullivan.

Q. State what conversation, if any, you had with her that morning, concerning Mr. Sullivan.

A. (Continuing:) She told me that Mr. Sullivan had called them some time in the evening, between ten and eleven o'clock, and stated that he left all his real and personal estate to Marie Carrau.

Q. What did you do then?

A. She asked me to see a lawyer about this verbal will, whether it was any good, and I do not know, how many days, I waited, whether one day or two days, but I saw Dan

Kelleher, and asked him whether a verbal will made before witnesses was legal in this case, and he said no.

A. (Continuing:) Then I told Marie Carran what Dan Kelleher had said.

Q. What conversation, if any, did you have with anyone else, if you had any?

A. About this matter?

A. I do not know how long after that; it was perhaps some days, and perhaps weeks. I was on some business in Mr. Donworth's office, on business of my own, rather, and he brought up a conversation of this will case, or whether I did I don't remember, but he said he thought it was null and void. I told him that if he knew the circumstances as much as I knew about, I thought at least the intention of Sullivan was to have her his heir, as far as I could see.

A. That it was Sullivan's intention, as far as I could see, that she was to be his heir; that is what I told him. I gave him my reasons. After I gave him my reasons he told me if that was the case we had better pursue it.

The wife of Dr. Eames testified in substance, that for many years, they had lived next door neighbor to Marie Carran, and in speaking of Miss Carran's life, said:

"She lived very quietly. She received few callers. Never knew her to have a man call on her, she never was in company with any man except Mr. Sullivan, that I knew of. Her life was of the purest and the best, she was devoted to her church, being a Roman Catholic, and lived as good and pure a life as any one could." (Trans., page 242.)

And again, on page 243, she testified as to a conversation between Miss Carran and Mr. Sullivan, shortly before his death, in which Mr. Sullivan said:

"As you know, I have no relatives and no friends and I am possessed of a good deal of means, property, money, and if you consent to become my wife, I will absolutely convey to you everything I possess in this world. I love you dearly and I feel I cannot live without you."

We quote this evidence to show the character of Marie Carrau and her relations with Mr. Sullivan, and in opposition to the claim made by the solicitors for these appellants, that this will was the result of a conspiracy.

The contention by solicitors for appellants, that the nuncupative will was a "fraud and born of a conspiracy" between this respondent and W .F. Hayes, and that the same was not heard of for months after the death of Sullivan, is flatly contradicted by the testimony of Marie Carrau at page 273, and by Father Sweere at pages 218, 219 and 220, in which the latter testified that upon reading in the newspaper of Sullivan's death, the next morning after his death, he immediately visited this respondent for the purpose of consoling her in her grief. He knew of the engagement of Marie Carrau to John Sullivan, and was her spiritual comforter, and the respondent on this first visit after the death told him of the very words spoken by Sullivan the night of his death, and which constitute the nuncupative will, and was then asked to see a lawyer and learn if an oral will was good, which the father did and reported to Marie Carrau that it was not, page 219, and the evidence shows that Hayes knew nothing of these words having been spoken, for months thereafter, and that it only came to him incidentally through his family, and after learning that Attorney Hayes thought these words sufficient, she went to see him at his office.

And again, these facts were made known to the firm of Piles, Donworth & Howe and Judge Burk, very shortly after Sullivan's death, and long before any attempt was made to probate the nuncupative will and before Hayes ever heard of the will, and these statements are not denied, page 220, Trans.; and the record also shows the reason why she did not attempt earlier to prove the nuncupative will, which was because Law-

yer Kelleher had told Father Sweere that these words spoken did not constitute a will in this state, and the father had carried this information to her.

And we insist that there is not a statement anywhere in the record that throws the least suspicion on the entire good faith and honesty of this respondent and those connected with this will and its probation. Every circumstance surrounding the transaction and every word and act on the part of Marie Carran, is consistent with the very highest integrity and from beginning to end there is nothing strange, unusual or unreasonable. There was nothing said or done that would not be said or done by the purest woman in the world; that she was engaged to Sullivan and that they would have been married October 1, 1900, is placed beyond dispute by this record, and believing in the absolute integrity of John Sullivan, it was not strange that Marie Carran believed that he had willed to her all of his estate, and knowing nothing of the laws' requirements with reference thereto, it was not strange, after Father Sweere had told her that an oral will was not good in this state, that she should believe that there must be a written will in existence. Believing that Sullivan intended her to inherit his fortune, she has done what a woman without means could do to receive the benefits thereof. It is perhaps, not strange when the evidence taken in Ireland has been read and the character of the witnesses and the conduct of their coachers considered, that Marie Carran and her family should have their integrity and good faith questioned by innuendo. At every step in the pathway of the fight for this estate, wherever Marie Carran or her attorneys or the courts, have for one moment checked the approach of these appellants or their

hungry representatives to the possession of the assets of this $500,000 estate, they have cried fraud and conspiracy.

APPELLANTS NOT INTERESTED PARTIES.

A careful reading of the testimony taken in Ireland in support of the alleged relationship to the deceased Sullivan, will, we confidently submit, convince the Court, that they were in no manner related. Carran's Exhibit A (Trans. 809) furnishes the fatal "missing link" in the chain of kinship upon which the rights of appellants depend, and this weakness destroys the whole chain.

Bridget McAuliffe was the child of Denis McAuliffe and not the child of Daniel McAuliffe. So say the records. And these appellants must have established by competent proof that she was the child of Daniel before they can be heard as heirs of Sullivan. It is easy to draw upon one's imagination when stimulated by hunger for wealth, but to conclude that the church records meant "Daniel for Denis" can not be made to take the place of the proof required by the rules of evidence.

The Sullivans and the McAuliffes, the McAuliffes and the Murphys, the Norrys and the Honoras, are entirely too numerous, to accept the sameness of name alone to establish the kinship required to inherit.

We confidently assert that no one can read the testimony taken in Ireland in support of the appellants' allegations of kinship, without being impressed with the absolute want of knowledge of the persons who testified as to the Sullivan family, nor can one fail to see the "hand from Seattle" as they are helped over the weakness of memory.

Whether John Sullivan died with or without living relatives is still an open question, but sure it is, that these appel-

lants are not related, except upon the theory that "all men are brothers."

In closing we submit that the decision of the circuit court of appeals should be affirmed.

J. W. Robinson,

J. P. Houser,

Counsel for Respondents